

***United States Court of Appeals  
for the Second Circuit***



**AMICUS BRIEF**





NO. 77-4083

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

THE LONG ISLAND COLLEGE HOSPITAL,  
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,  
Respondent,

and

LOCAL 144, HOTEL, HOSPITAL NURSING HOME  
AND ALLIED SERVICES UNION, SEIU, AFL-CIO,  
Intervenor.

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Petition To Review And Set Aside A Decision  
And Order Of The National Labor Relations Board

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MOTION FOR LEAVE TO FILE REPLY BRIEF AMICUS CURIAE  
AND TO ENGAGE IN ORAL ARGUMENT ON BEHALF OF THE  
AMERICAN HOSPITAL ASSOCIATION

and

REPLY BRIEF AMICUS CURIAE ON BEHALF  
OF THE AMERICAN HOSPITAL ASSOCIATION

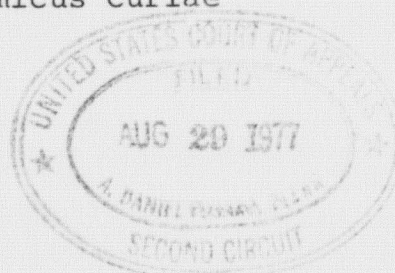
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MOTION FOR LEAVE TO FILE REPLY BRIEF AMICUS  
CURIAE AND TO ENGAGE IN ORAL ARGUMENT ON BEHALF  
OF THE AMERICAN HOSPITAL ASSOCIATION

The American Hospital Association (hereinafter referred to as the "AHA") respectfully moves for leave to file a reply brief amicus curiae<sup>1/</sup> and to engage in oral argument in support of the position of The Long Island College Hospital, urging the Court to set aside an order of the National Labor Relations Board and to deny enforcement of the Board's order in The Long Island College Hospital, 228 NLRB No. 13 (1977).

The AHA states as follows:

1. The AHA is a non-profit association of more than 7,000 member institutions engaged in delivery of health care. It is the largest association of health care institutions of its kind in the United States.

2. The decision of the National Labor Relations Board in this case, to apply its doctrine of comity to a New York State Labor Relations Board (hereinafter referred to as the "SLRB") certification of a hospital plant and engineering department amounts to an abdication of its statutory responsibility to "... decide in each case ... the unit appropriate for the purposes of collective bargaining... ." <sup>2/</sup> This very point was recently made by the Third Circuit:

"Thus the statute requires the Board to exercise its discretion as to an

<sup>1/</sup>

On June 29, 1977 Circuit Judge Mansfield entered an order granting AHA's motion for leave to file brief amicus curiae in the instant case.

<sup>2/</sup>

§9(b), 29 U.S.C. §159(b).



appropriate unit in each and every case. This responsibility can neither be delegated to nor discharged by a state agency where Congress has sought to create a national labor policy by vesting this discretion in a national board. LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18, 24-27 (1948). Here, however, the Board abdicated its required duty by accepting the PLRB determination without exercising its own mandated discretion. In so doing the Board overstep[ped] the law. Packard Motor Car Co., v. NLRB, *supra* at 491." Memorial Hospital of Roxborough v. NLRB, 545 F.2d 351, 360 (1976).

The Labor Board has refused to follow the holding of the Third Circuit in Memorial Hospital of Roxborough, in this case.<sup>3/</sup>

This is of vital concern to AHA's membership.<sup>4/</sup> Enforcement of the Board's Decision and Order would severely impede the responsibility and intent of the Board to fashion a uniform national policy in health care labor relations matters, and "would conflict with the federal pre-emption achieved by the new amendments."<sup>5/</sup> Enforcement would also give judicial sanction

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<sup>3/</sup> "With all due respect for the views expressed by the Court of Appeals for the Third Circuit in its opinion in Memorial Hospital of Rxoborough v. N.L.R.B., ... we respectfully adhere to the Board majority's opinion in that case, reported at 220 NLRB No. 73 (1975), until such time as the Supreme Court shall have passed on the matter." 228 NLRB No. 13, n.2 (citation omitted).

<sup>4/</sup> Its membership includes, *inter alia*, the Petitioner herein, as well as thousands of hospitals, located in thirteen state jurisdictions whose laws regulated health care labor relations matters prior to Public Law 93-360 (August 25, 1974), or located in states where there was no adequate regulation whatsoever.

<sup>5/</sup> San Diego Building Trades Council, et al., v. Garmon, 359 U.S. 236, 241-242 (1959). See also Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957).

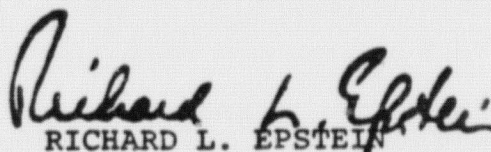


to a Board policy (application of its comity doctrine) which would result in federally-approved fragmented bargaining units in the health care industry. This contravenes Congressional intent that "due consideration should be given by the Board to prevent proliferation of bargaining units in the health care industry."<sup>6/</sup>

The matter at issue here, accordingly, transcends the interests of the particular parties involved. This case raises matters of recurring importance in the administration of the new health care amendments of the National Labor Relations Act. Nevertheless, the General Counsel in its brief, and the Intervenor in its brief, ignored the arguments made by the amicus in its principal brief concerning adoption of uniform federal policy in health care labor relations matters, and the concerns expressed by AHA relative thereto.

For these reasons, the AHA respectfully requests leave to present its views both in the annexed reply brief and in oral argument.

Respectfully submitted,

  
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<sup>6/</sup>

S. Rep. No. 93-766, 93d Cong., 2d Sess. 5 (1974).



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### ARGUMENT

The amicus' principal brief argued that the Board's order in this case should be set aside on two separate and independent grounds: (a) the Board's application of its comity doctrine to state ordained bargaining units in the health care industry amounts to an abdication of its statutory responsibility (amicus brief, pp. 3-7); and (b) the Board's policy of granting comity to state created bargaining units when applied to health care institutions contravenes the intent of Congress (amicus brief, pp. 8-16). Neither the General Counsel's brief nor the Intervenor's brief has persuasively countered either one of those contentions.

1. The General Counsel's brief conceded (Bd. brief p. 14) as it must, that the Third Circuit in Memorial Hospital of Roxborough v. NLRB,<sup>1/</sup> (a case which we submit is controlling herein (amicus brief, pp. 3-6)) held that the Board abdicated its statutory responsibility by granting comity to a state agency's health care unit determination. "This responsibility can neither be delegated to nor discharged by a state agency where Congress has sought to create a national labor policy by vesting this discretion in a national board," 545 F.2d 351 at 360 (citation omitted) (emphasis added). The General Counsel's contention that "sound policy" underlies the Board's extension of comity to the New York State Labor Relations Board unit determination herein (Bd. brief, p. 17) is specious. Application of

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<sup>1/</sup> 545 F.2d 351 (3rd Cir. 1976).



a "policy" to grant comity does not, we submit, discharge the Board's statutory duty to exercise its discretion as to an appropriate unit "in each and every case" under Section 9(b) of the Act; especially where the Board is formulating bargaining units in the newly covered health care industry.

Moreover, the cases relied upon by the General Counsel<sup>2/</sup> (Bd. brief pp. 9-11), which the General Counsel contends supports the Board's actions here in granting comity to the SLRB certification are not applicable to The Long Island College Hospital for several reasons:

1. The cases cited did not involve a section 2(14) health care institution employer;<sup>3/</sup>
2. The industries involved in those cases had not been singled out by Congress either in statute or in legislative history for the kind of extensive special Board treatment and consideration characteristic of health care legislation;

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<sup>2/</sup> Bluefield Produce & Provision Company, 117 NLRB 1660 (1957); The West Indian Co., Ltd., 129 NLRB 1203 (1961); Screen Print Corporation, 151 NLRB 1266 (1965); Cornell University, 183 NLRB 329 (1970).

<sup>3/</sup> Mercy-Memorial Hospital Corporation, 221 NLRB No. 1 (1975), pet. for enforcement docketed, NLRB v. Mercy-Memorial Hospital, No. 76-2338 (6th Cir.), is distinguishable on its facts and is not dispositive of this case. In contrast to the instant case, the issue of pre-emption was not raised therein; the unit was agreed to pursuant to a consent election; no irregularities were alleged; no objections to the election were filed; and, of perhaps paramount importance, "the unit certified -- consisting of hospital service and maintenance employees -- was not repugnant to the policies of the Act, but on the contrary, was the close conformity with units found appropriate by the Board in similar cases." Mercy-Memorial (emphasis added) citing, Newington Children's

(continued on next page)



3. Only the health care industry has been protected by Congress against Board creation of unduly proliferated bargaining units;
4. The case cited by the General Counsel presented fact situations where unit appropriateness was agreed upon by the parties, or not contested as it was in this case.

2. The General Counsel brief does not deal in substance with, much less refute, the amicus' argument that the Board's application of its comity doctrine to state ordained hospital bargaining units would conflict with the federal pre-emption<sup>4/</sup> achieved by the new amendments (amicus brief, pp. 8-16). Clearly, the Congress intended to pre-empt state regulation in order to develop uniform federal labor regulation of the health care industry.<sup>5/</sup> At the same time, pre-emption of state

<sup>3/</sup>  
(continued from preceding page)

Hospital, 217 NLRB No. 134 (1975); Nathan and Miriam Barnert Memorial Association d/b/a Barnert Memorial Hospital Center, 217 NLRB No. 132 (1975). By contrast, the Board has recently rejected a whole spate of petitions for separate maintenance units in health care institutions. See amicus br. pp. 6-7, n.5.

<sup>4/</sup>  
San Diego Building Trades Council, et al. v. Garmon, 359 U.S. 236, 241-242 (1959); Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957).

<sup>5/</sup>  
See e.g., the statements by Congressman Thompson (Legislative History, p. 317; Vol. 120 Cong. Rec. H4598 (daily ed. May 20, 1974)) and Senator Taft (Legislative History, pp. 117-118; Vol. 120 Cong. Rec., S6942 (daily ed. May 2, 1974)) in the debates over the House and Senate bills, citing a need "for federal legislation to remove the artificial distinction that exists" because of the past state regulation, and calling for "a national approach" to health care labor regulation.



bargaining unit determinations would avoid serious conflicts<sup>6/</sup> arising from situations where thirteen states, including New York, had already spun out an extensive pattern of dissimilar units varying from one jurisdiction to another.

The General Counsel's brief ignores this anomalous situation and the consequent problems. We submit that the Board's failure to adhere to the pre-emption doctrine cannot be countenanced. The General Counsel's arguments are neither grounded

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<sup>6/</sup>

The Supreme Court has had occasion to address itself to this point.

"A certification by a state board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision. These are the very real potentials of conflict which lead us to allow supremacy to the federal scheme even though it has not yet been applied in any formal way to this particular employer,"  
LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board, 336 U.S. 18, 25-26 (1949). Memorial Hospital of Roxborough v. NLRB, supra, at 360.

The General Counsel apparently concedes through its silence in its brief, the efficacy of this argument. Intervenor's attempts to distinguish LaCrosse on the basis of timing of Board jurisdiction is a distinction without a difference (Intervenor's brief, pp. 18-19).



in the legislative history,<sup>7/</sup> the ample case law nor reason and, therefore, must be rejected.

7/

The Board's brief ignores the amicus' citation to the legislative history (amicus br. pp. 11-12, 13) and, instead, places reliance upon a post-passage statement by Congressman Thompson (Bd. brief, pp. 18-19) which does not appear in the Legislative History to Public Law 93-360. Congressman Thompson's remarks (Vol. 120 Cong. Rec., E4899) were made on July 22, 1974, eleven days after the House of Representatives voted final approval of the Conference Report and two months after the House passed the amendments. The Supreme Court in the Regional Rail Reorganization Cases, 419 U.S. 102, 42 L.Ed 2d 320, 95 S.Ct. 335 (1974), stated:

"[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. See, e.g., United States v. Mine Workers of America, 330, US 258, 282, 91 L Ed 884, 67 S. Ct 677 (1947). Such statements 'represent only the personal views of these legislators, since the statements were [made] after passage of the Act' National Woodwork Manufacturers Assn. v. NLRB, 386 US 612, 639 n 34, 18 L Ed 2d 357, 87 S Ct 1250 (1967)." 419 U.S. at 132.

Congressman Thompson's remarks must be disregarded in determining legislative intent.



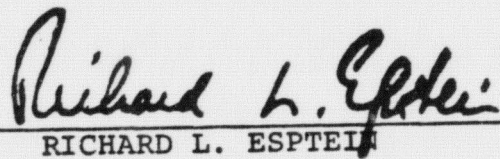
CONCLUSION

For the reasons stated above, and certainly for the reasons set forth in the Petitioner's brief and the amicus' principal brief, the amicus respectfully submits that the Board's decision and order should be set aside and enforcement thereof should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing were served by certified mail, return receipt requested on August 22, 1977 to the following persons:

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